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No. 97-300

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

Supreme Court, U.S.
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IN RE TERRY STEWART, ET AL.,

Petitioners.

MOTION TO PROCEED IN FORMA PAUPERIS

Ramon Martinez-Villareal moves this Court for leave to file the attached Brief in Opposition in this case without payment of costs and to proceed in forma pauperis. Mr. Martinez-Villareal was found indigent by the United States district court below, and counsel was appointed to represent him in those proceedings, and

41 pp.

proceedings in the Court of Appeals under 21 U.S.C. § 848(q).

Respectfully submitted this 17th day of September, 1997.

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No. 97-300

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

IN RE TERRY STEWART, ET AL.,

Petitioners.

BRIEF IN OPPOSITION TO COMBINED ALTERNATIVE PETITION FOR STATUTORY WRIT OF CERTIORARI OR FOR EXTRAORDINARY WRIT (MANDAMUS, PROHIBITION, OR COMMON LAW WRIT OF CERTIORARI)

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CAPITAL CASE

QUESTIONS PRESENTED

Petitioners' "Combined Alternative Petition" does not properly present the questions it purports to raise, but instead presents the following questions:

1. Whether this Court has jurisdiction to review the Court of Appeals' action below, in light of 28 U.S.C. § 2244(b)(3)(E) which prohibits judicial review of a Court of Appeals' judgment allowing a petitioner to file a second habeas petition in the district court, and Felker v. Turpin, 116 S.Ct. 2333 (1996) which held this prohibition constitutional?

2. Whether the Court of Appeals' action below calls for this Court's review or intervention, when it was based on the conclusion--reached by every other Court of Appeals that has considered the question--that the dismissal of a constitutional claim in a first habeas corpus petition without a resolution of its merits and on motion of the state respondents, does not render a later petition seeking review of that claim a "second or successive" petition barred under 28 U.S.C. §2244(b)?

3. Whether the extraordinary equitable relief sought by the Petitioners is warranted in light of the Petitioners' conduct in this litigation?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW ix

JURISDICTION x

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRITS 13

CONCLUSION 23

TABLE OF AUTHORITIES

FEDERAL CASES

Bankers Life & Casualty Co. v. Holland, 346 U.S. 379 (1953) xii

Barnard v. Collins, 13 F.3d 871 (5th Cir. 1994) 15

Benton v. Washington, 106 F.2d 162 (7th Cir. 1996) viii, 6, 18

Burris v. Parke, 95 F.3d 465 (7th Cir. 1996) 19, 22

Camarano v. Irvin, 98 F.3d 44 (2nd Cir. 1996) viii, 18, 19, 21

Casey v. Planned Parenthood of Pennsylvania, 14 F.3d 848 (3rd Cir. 1993) 20

Christy v. Horn, 115 F.3d 201 (3rd Cir. 1997) 17, 19

In re Davis, 1997 WL 534153 (5th Cir. Aug. 27, 1997) 17

U.S. Department Of Energy v. Roth, 882 F.2d 519 (Em.App. 1989) xi

Dickinson v. Maine, 101 F.3d 791 (1st Cir. 1996) . . . viii, 18

Duncan Townsite Co. v. Lane, 245 U.S. 308 (1917) xi

Felker v. Turpin, 116 S. Ct. 2333 (1996) . . . . . vii, ix

Ford v. Wainwright, 477 U.S. 399 (1986) 3, 4

In re Gasery, 116 F.3d 1051 (5th Cir. 1997) . . . 17, 18, 19

Johnson v. Robison, 415 U.S. 361 (1974) ix

Kerr v. United States District Court for the Northern District of California, et al, 426 U.S. 394 (1976) xii

Landgraf v. USI Film Products, 114 S. Ct. 1483 (1994) . . . 19

Lindh v. Murphy, 117 S. Ct. 2059 (1997) 19

Martinez-Villareal v. Lewis, 80 F.3d 1301 (9th Cir.) . . . 2, 4

Martinez-Villareal v. Stewart, 118 F.3d 625 (9th Cir. 1997) . . . . . passim

McNary v. Haitain Refugee Center, Inc., 498 U.S. 479 (1991) ix

In re Medina, 109 F.3d 1556 (11th Cir. 1997) 16, 17

Morrow v. District of Columbia, 417 F.2d 728 (D.C.Cir. 1969) xi

Reeves v. Little, No. 87-741, 1997 WL 459783 (10th Cir. Aug. 13, 1997) 17, 18

Roche v. Evaporated Milk Association, et al., 319 U.S. 21 (1943) . . . . . x, xi

Sawyer v. Whitley, 505 U.S. 333 (1992) 19

Schlup v. Delo, 115 S. Ct. 851 (1995) 19

In re Turner, 101 F.2d 1323 (9th Cir. 1997) . . . . . viii, 18

Ulmet v. United States, 17 Cl. Ct. 679 (U.S.Cl. Ct. 1989), aff'd, 935 F.2d 280 (Fed. Cir. 1991) 20

United States Alkali Association v. United States, 325 U.S. 196 (1945) xi

United States ex rel. Greathouse v. Dern, 289 U.S. 352 (1933) xi

In re Vial, 115 F.3d 1192 (4th Cir. 1997) 18

Will v. United States, 389 U.S. 90 (1967) xii

DOCKETED CASES

Martinez-Villareal v. Pinal County Superior Court, et al., No. CV-97-0206-SA (May 13, 1997) 10

Martinez-Villareal v. Pinal County Superior Court, No. CV-97-0206-SA (AZ, May 16, 1997) 9, 12

Martinez-Villareal v. Stewart, No. CIV-86-296-TUC-RMB passim

State v. Martinez-Villareal, No. CR-83-0207 6

State v. Martinez-Villareal, No. CR-97022291 8

FEDERAL STATUTES

28 U.S.C. § 1651 . . . . . x, xii
28 U.S.C. § 1651 8
28 U.S.C. § 2241 22
28 U.S.C. § 2244(b)(3)(E) . . . . vii, ix, xii, 13
28 U.S.C. § 2244(b) . . . . . viii, 10, 19
28 U.S.C. § 2244 . . . . . vii, viii, 14, 18
28 U.S.C. § 2244(b)(1), (b)(3)(A) 6

STATE STATUTES

A.R.S. § 13-4022 (1978)(repealed 1993) 2

A.R.S. §13-4022(G) 9

RULES OF COURT

Sup.Ct. Rule 20.3 (a), (b). x

Fed.Civ.P. Rule 59 6

OPINIONS BELOW

In addition to the opinion identified by Petitioners, the Ninth Circuit Court of Appeals also issued an opinion on May 19, 1997, in Martinez-Villareal v. Stewart, 118 F.3d 625 (9th Cir. 1997), deciding other issues raised in this case, and an Order on June 25, 1997, denying as moot Mr. Martinez-Villareal's petition for rehearing and suggestion for rehearing en banc on these issues. See Exhibit A.

JURISDICTION

Petitioners present no plausible jurisdictional basis for this Court to review the action of the Court of Appeals below.

A. Certiorari Jurisdiction

Petitioners ask this Court to review the Court of Appeals' disposition of Mr. Martinez-Villareal's authorization motion brought under 28 U.S.C. §2244. But the same 1996 amendments to the habeas corpus statute that Petitioners claimed in the court below required the Court of Appeals to authorize, or decline to authorize, Mr. Martinez-Villareal's habeas petition also restricted this Court's jurisdiction to review that authorization decision:

> the grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

28 U.S.C. § 2244(b)(3)(E). This Court has upheld the constitutionality of this restriction, stating that it "preclud[es this Court] from reviewing, by appeal or petition for certiorari, a judgment on an application for leave to file a second habeas petition in district court..." Felker v. Turpin, 116 S.Ct. 2333, 2338-39 (1996).

Petitioners claim that §2244(b)(3)(E)'s prohibition on

certiorari review does not apply because the appellate court "dismissed" the §2244 motion, rather than "denied" it. The statute's clear prohibition on certiorari review does not depend on the label used by the appellate court. Whether the appellate court denies, grants or dismisses the authorization motion, the prohibition on certiorari remains the same. Some appellate courts, like the Court of Appeals here, have "dismissed" authorization motions after concluding that the habeas petition was not a second or successive petition within the prohibition of § 2244(b). In those cases, certiorari review has not been sought, presumably because the respondents knew no jurisdiction existed. See e.g., Camarano v. Irvin, 98 F.3d 44 (2nd Cir. 1996). Still other appellate courts reaching this same conclusion have "denied" the authorization motion. See, e.g., In re Turner, 101 F. 2d 1323 (9th Cir. 1997); Benton v. Washington, 106 F.2d 162 (7th Cir. 1996). And other appellate courts simply hold that the petition is not a "second or successive petition within the meaning of 28 U.S.C. § 2244(b), and can be filed in the district court. Dickinson v. Maine, 101 F.3d 791 (1st Cir. 1996). Despite the different labeling, and even where no label is used, judicial review of the authorization decision by

certiorari is prohibited.[1]

B. Extraordinary Jurisdiction.

Implicitly acknowledging the lack of statutory certiorari jurisdiction, Petitioners propose an array of alternative extraordinary writs in an attempt to get this Court to review a decision Congress had exempted from its review. Petitioners first ask this Court to find jurisdiction under the writ of mandamus or writ of prohibition to review the authorization decision. Although unclear, it appears that they are asking this Court to prohibit the lower district court from considering Mr. Martinez-Villareal's competency claim, and "to remedy the court of appeals' error." Combined Alternative Petition at 25. But

[1]Petitioners' reliance on Johnson v. Robison, 415 U.S. 361 (1974) and McNary v. Haitain Refugee Center, Inc., 498 U.S. 479 (1991), is misplaced. First, this case does not seek judicial review of action taken by an federal agency where a "strong presumption" favoring judicial review applies. McNary, 498 U.S. at 498. Second, in both those cases, the statute prohibited judicial review of the agency's determination that an individual did or did not qualify for a certain status or benefits under the relevant statute. McNary v. Haitian Refugee Center, Inc., 498 U.S. at 493-94; Johnson v. Robison, 415 U.S. at 373-74. However, this Court found that it had jurisdiction over challenges to the constitutionality of the statutes. Id. Here, Petitioners do not challenge the constitutionality of § 2244(b)(3)(E), and this Court has already determined that this statutory provision is constitutional. Felker v. Turpin, 116 S.Ct. at 2338-39.

Petitioners did not name or serve as respondents the Court of Appeals' judges, or the District Court judge "against whom relief is sought". Sup.Ct.Rule 20.3(a) and (b).[2]

In addition, the relief they request is not "necessary or appropriate in aid of" this Court's jurisdiction to review the Court of Appeals' authorization decision, see 28 U.S.C. § 1651, because, as explained, there is no review jurisdiction over this decision. Once the lower courts have reviewed Mr. Martinez-Villareal's competency claim, this Court will have jurisdiction to review on certiorari the ultimate disposition. However, the relief requested by Petitioners clearly cannot "aid" that potential jurisdiction. 28 U.S.C. § 1651. This appellate review then remains unobstructed. See Roche v. Evaporated Milk Ass'n, et al., 319 U.S. 21, 26 (1943)("while function of mandamus in aid of appellate jurisdiction is to remove obstacles to appeal, it may not appropriately be used merely as a substitute for the appeal procedure prescribed by the statute").

Moreover, the fact that Petitioners must await the outcome of the District Court proceedings before petitioning this Court

[2]They also did not name Mr. Martinez-Villareal as a respondent, although he was served with the Combined Alternative Petition.

for review does not justify use of the extraordinary writ. See United States Alkali Association v. United States, 325 U.S. 196, 202 (1945); Roche v. Evaporated Milk Ass'n. et al., 319 U.S. at 31. This is particularly so here where the delay is caused solely by Petitioners' actions. They were the ones who asked the federal courts to dismiss the competency claim without prejudice because it was not yet ripe. They were the ones who asked the federal courts to hear the claim at this time--after all Mr. Martinez-Villareal's other claims had been resolved. They were the ones who specifically requested multiple federal proceedings in this case. They can hardly be heard to complain now about delay, and to invoke this Court's extraordinary remedies.

"Although the remedy by mandamus is at law, its allowance is controlled by equitable principles." United States ex rel. Greathouse v. Dern, 289 U.S. 352, 359 (1933). See Duncan Townsite Co. v. Lane, 245 U.S. 308, 311 (1917)("Although classed as a legal remedy, its issuance is largely controlled by equitable principles."); U.S. Dept. Of Energy v. Roth, 882 F.2d 519, 521 (Em.App. 1989)(writ of mandamus "has been viewed in the same light as equitable remedies"); Morrow v. District of Columbia, 417 F.2d 728, 736 (D.C.Cir. 1969)("The governing principles are equitable, even though the writ of mandamus

technically issues at law."). The equities do not favor Petitioners' request.

Nor do exceptional circumstances exist to invoke this extraordinary remedy. The writ "has traditionally been used in the federal courts only `to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" Will v. United States, 389 U.S. 90, 95 (1967), quoting Roche v. Evaporated Milk Ass'n., 319 U.S. at 26. Thus, "only exceptional circumstances amounting to a judicial `usurpation of power' will justify the invocation of this extraordinary remedy." Kerr v. United States District Court for the Northern Distri t of California, et al, 426 U.S. 394, 402 (1976), quoting Will v. United States, 389 U.S. at 95. To invoke this remedy, Petitioners must show that their right to it is "clear and indisputable." Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 384 (1953). As demonstrated below, Petitioners cannot make this showing.

For all these reasons, jurisdiction is inappropriate under § 1651 and contrary to Congressional limitations on the review of authorization decisions under § 2244(b)(3)(E).

I. STATEMENT OF THE CASE

Petitioners attempt to invoke yet another procedural artifice to prevent judicial review of Ramon Martinez-Villareal's constitutionally dubious sentence of death. Ramon Martinez-Villareal is mentally ill, mentally retarded, brain-damaged, unable to speak English and unable to read any language. The sentencing judge, members of the Arizona Supreme Court, and the U.S. District Court have all expressed concerns about the propriety of Mr. Martinez-Villareal's execution in light of his feeble mental condition. However, Petitioners have employed a series of crafty procedural ploys to prevent judicial review of constitutional claims that arise from Mr. Martinez-Villareal's severe disabilities. The ruling below simply tailored a remedy, specific to the unprecedented facts of this case, which allows Mr. Martinez-Villareal to be heard on his claim that he is mentally unfit for execution.

A. Procedural History

Petitioners present a somewhat misleading view of the procedural posture in which the issues in this case arise. In 1991, counsel for Mr. Martinez-Villareal gained access to his medical and psychiatric files after much resistance from Petitioners. Those files establish that Mr. Martinez-Villareal had been treated for psychosis by prison psychiatrists since 1986. Sean Bruner, Martinez-Villareal's newly appointed counsel, raised the competency issue in the courts of Arizona promptly after obtaining those records.[1]

Counsel for Petitioners successfully urged the dismissal of Mr. Martinez-Villareal's competency claim from his state post-conviction motion because he should have proceeded under a state statute governing competency for execution. Counsel for Mr. Martinez-Villareal then attempted to invoke the statutory procedure, but was unsuccessful because former A.R.S. § 13-4022 (1978)(repealed 1993) provided that only the Director of the Department of Corrections could initiate judicial inquiry into a prisoner's competence for execution, and the Director refused counsel's written pleading that he do so. After thus exhausting his state remedies, Mr. Martinez-Villareal sought federal habeas corpus review of his claims, including his exhausted, undefaulted and unadjudicated claim that he is incompetent for execution.

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[1]The claims based on Mr. Martinez-Villareal's mental disabilities included ineffective assistance of counsel as well as lack of competence for execution. He obtained sentencing relief on his claim of ineffective assistance of counsel. On appeal, the Ninth Circuit vacated the resentencing order solely on the grounds of procedural default. Martinez-Villareal v. Lewis, 80 F.3d 1301 (9th Cir.), cert. denied, 117 S. Ct. 588 (1986).

1. Events Preceding Dismissal Without Prejudice

In 1993, in his first appearance before the District Court, Mr. Martinez-Villareal alleged that he "did not and does not have the mental capacity to appreciate the nature of his sentence." Amended Petition for Writ of Habeas Corpus ("Habeas Petition"), filed Mar. 26, 1993 at ¶ 4.16, and that under Ford v. Wainwright, 477 U.S. 399 (1986), his execution would violate the Eighth and Fourteenth Amendments. Id. at ¶ 106.

Petitioners argued that the District Court did not have jurisdiction to hear the claim because it was "not now ripe for determination" and should be brought when an execution "warrant has been issued." Martinez-Villareal v. Lewis, CIV 86-296-TUC-RMB, Reply to Response to Motion for Summary Judgment, at 45-46 (Dec. 17, 1993). Describing Mr. Martinez-Villareal's desire to have the claim decided at that time as "unworkable," Petitioners stated that it was important to:

> have a single adjudication of competency, at a time when all [petitioner's] other claims have been resolved and a warrant has been issued, so that an execution actually is imminent within a reasonable period of time...To do a competency determination now would be futile, because it will certainly have to be repeated when the time for execution finally arrives.

Id.(emphasis added). Although Mr. Martinez-Villareal's claim was exhausted, not procedurally barred, and unadjudicated by the

state court, the District Court adopted Petitioners' position:

> At present, there is no execution warrant outstanding as to Martinez-Villareal since this Court issued its stay. Thus, Martinez-Villareal is not facing execution nor with appellate review will he face likely execution in the near future. This claim is premature and denied without prejudice.

Order and Memorandum Opinion, Oct. 21, 1994, at 19(emphasis added).

The District Court granted sentencing relief after finding that trial counsel was ineffective. Order and Memorandum Opinion, Oct. 21, 1994, at 30.

On appeal, the Ninth Circuit Court of Appeals found that the writ was improperly granted because Mr. Martinez-Villareal's claim of ineffective assistance of counsel was procedurally barred. Martinez-Villareal v. Lewis, 80 F.3d at 1305. The court explicitly stated, however, "[t]o eliminate any ambiguity, we reiterate that the claim of Martinez-Villareal's current incompetence was denied as premature by the district court. That decision was not challenged on appeal. Our instruction to enter judgment denying the petition is not intended to affect any later litigation of that question." Id. at 1309, n.1 (emphasis added).

2. Events Following Dismissal Without Prejudice

On remand, the District Court entered an order again

denying, "without prejudice," Mr. Martinez-Villareal's exhausted, undefaulted and unadjudicated competency challenge. Order and Entry, Feb. 28, 01997. [Doc. Nos. 152 and 153]. Mr. Martinez-Villareal's counsel, however, moved to amend the judgment pursuant to Fed.Civ.P. Rule 59 "direct[ing] the Court's attention" to the Antiterrorism and Effective Death Penalty Act ("AEDPA) [the amendments to the federal habeas corpus statutes enacted in 1996] and quoted 28 U.S.C. §2244(b)(1), (b)(3)(A) and §2255. Counsel for Mr. Martinez-Villareal summarized the possible effect of these new enactments, noting:

> In other words, petitioner's claim of incompetence to be executed would be barred notwithstanding this Court's dismissal "without prejudice." This would contravene the clear intention of the parties, violate due process under the Fifth and Fourteenth Amendments, and constitute an unconstitutional suspension of the writ of habeas corpus in violation of Art. I, Sec. 9 of the Constitution.

Martinez-Villareal v. Stewart, No. CIV 86-296-TUC-RMB, Motion to Reconsider Order and Judgment (Mar. 11, 1997). Mr. Martinez-Villareal's counsel urged the District Court to reconsider the order dismissing this claim, and hold "the issue in abeyance pending the outcome of the current proceedings" ongoing in state

court. Id. at 2. Petitioners did not respond.[2]

The District Court denied Mr. Martinez-Villareal's motion, stating that the competency to be executed claim "was not ripe when it was presented. For this reason, the Court dismissed it without prejudice." Noting that Mr. Martinez-Villareal "warn[ed] the Court that the premature claim could be precluded as a successive claim" by the AEDPA, the Court stated that it "has no intention of treating the 'incompetency to be executed' claim as a successive petition." Order, Mar. 24, 1997 [Doc. No. 155], at 1. Again, Petitioners said nothing before or after this order was issued.

On April 15, 1997, the Arizona Supreme Court rescheduled Mr. Martinez-Villareal's execution for 12:05 a.m. on Wednesday, May 21, 1997. State v. Martinez-Villareal, No. CR-83-0207 AP (Ariz. Apr. 15, 1997). A competency hearing was held in the Pinal County Superior Court on April 6, May 6, 7 and 8, 1997.

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[2]The Arizona Supreme Court issued a warrant setting Mr. Martinez-Villareal's execution for April 16, 1997, then resetting it for May 21, 1997. Counsel for Mr. Martinez-Villareal moved for a hearing on his client's mental competence for execution before any warrant was issued. Petitioners state, "In early 1997, the defense *finally* filed a motion under the statute dealing with competency for execution, requesting a hearing." (Pet. at 2). The implication that Mr. Martinez-Villareal's counsel had not previously exhausted all available means for raising this claim under Arizona law is misleading.

Substantial evidence and testimony established that Mr. Martinez-Villareal suffers from a major psychotic disorder, which was traced back to his childhood, and that his condition is compounded by mental retardation and brain damage. The state claimed that Mr. Martinez-Villareal is malingering the symptoms of his mental illness.

Prior to and during the hearing, counsel for Mr. Martinez-Villareal asked the Arizona state court for leave to conduct a MRI scan and EEG of Mr. Martinez-Villareal and for examination by an expert specializing in the field of mental retardation. Counsel explained that the accusation that Mr. Martinez-Villareal was malingering his condition increased the need for a reliable determination of the issues of brain damage and mental retardation. All of the requests were denied and Mr. Martinez-Villareal had no opportunity to present such evidence. Although no state expert disputed Mr. Martinez-Villareal's brain damage or mental retardation, none of them performed any tests to determine the severity of these conditions or whether they interfered with his ability to understand or appreciate his impending execution.[3]

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[3]Mr. Martinez-Villareal has no appreciation of his pending execution and the reasons for it, and he has been incapable of assisting his counsel or participating in his appeals of his conviction and sentence of death. Though Mr. Martinez-Villareal has parroted statements that Department of Corrections staff interprets as evidence that he is aware that he has been convicted of murder and that he is to be executed, those very statements reflect the absence of a rational understanding of his conviction and sentence. In one statement, after asserting his innocence of the crime, Mr. Martinez-Villareal insisted that the transvestite clothing of the real killer is in his property in the prison. In another statement, he wrote a letter to his long-deceased sister asking her to arrange for the disposal of his earthly remains. Mr. Martinez-Villareal has never displayed or communicated a rational awareness of the judicial process that convicted him of murder and sentenced him to death.

On May 9, 1997, the state court determined, inter alia, that:

> Credible testimony and medical evidence was presented at the hearing herein that the Defendant may suffer form a mental illness, mental retardation and/or organic brain damage; credible testimony and medical evidence was likewise presented at the hearing herein that some or all of the symptoms or outward manifestations of those illnesses or conditions may be and may have been exaggerated or contrived by the Defendant; credible testimony and evidence was likewise presented at the hearing herein that the Defendant, even if suffering from any or all of those illnesses or conditions, would not necessarily thereby be precluded from being competent to be executed, as defined by the law . . . .

State v. Martinez-Villareal, No. CR-97022291, Minute Entry (May 9, 1997)(emphasis added). The state court concluded Mr. Martinez-Villareal failed to prove by clear and convincing evidence that he was not competent to be executed. Id.

The next court day, Monday, May 12, 1997, Mr. Martinez-Villareal filed a special action with the Arizona Supreme Court, pursuant to A.R.S. §13-4022(G), to review the lower court's order, and a motion to stay his execution. On Tuesday, May 13, 1997, the Arizona Supreme Court issued an order stating that it "will try to resolve the issues" by May 16 or May 19, 1997. Martinez-Villareal v. Pinal County Superior Court, et al., No. CV-97-0206-SA (May 13, 1997).

3. Proceedings On Claim Previously Dismissed Without Prejudice.

On May 13, 1997, counsel for Mr. Martinez-Villareal moved the District Court for appointment of counsel and for the tests and examinations which the state court had denied so that the District Court could decide whether his competency to be had been reliably determined in accordance with the Eight Amendment. Martinez-Villareal v. Stewart, No. CIV-86-296 TUC RMB, Motion for Expert Services and Appointment of Counsel (May 13, 1997).[4] On

[4]Petitioner had earlier sought appointment of counsel which had been denied by the District Court. In response to that motion, Respondents never mentioned its belief that the District Court had no authority to consider the supplemented Ford claim. Instead Respondents took no position on appointment of counsel and merely asked the District Court "in the interests of clarity" to assign "an appropriate new cause number to be used in these proceedings" so that there would be "some means of referring to such new activity." Martinez-Villareal v. Stewart, No. CIV 86-

May 14, 1997, the District Court appointed counsel and scheduled a conference regarding the motion for expert services or access on May 15, 1997, at 2:30 p.m.

On May 15, 1997, Petitioners responded to the motion and for the first time, claimed that the District Court "lacks jurisdiction to take any action" because the claim is "successive." Martinez-Villareal v. Stewart, No. CIV-86-296 TUC RMB, Response to Motion for Expert Services and/or Access to Client and Appointment of Counsel (May 15, 1997) at 1 (emphasis in original). Petitioners contended that under newly amended 28 U.S.C. §2244(b), Mr. Martinez-Villareal's claim "simply cannot be entertained in a successive petition." Id. at 2.

Mr. Martinez-Villareal's counsel responded that Petitioners should be judicially estopped from this about-face because of their earlier inconsistent position. Martinez-Villareal v. Stewart, No. CIV-86-296 TUC RMB, Reply to Response to Motion for Expert Services and/or Access to Client and Appointment of Counsel (May 15, 1997).

At the hearing, the District Court, the Honorable Richard Bilby, expressed concerns, based on Petitioners' argument, that

296-TUC-RMB (Mar. 28, 1997).

the AEDPA withdrew his jurisdiction. Judge Bilby indicated that he believed Mr. Martinez-Villareal was severely ill and mentally retarded and was not malingering. The District Court declared:

> This Court can only state that its observations of the Petitioner in 1994 called into serious doubt the Petitioner's competence. At the three-day evidentiary hearing ... the State psychiatrist testified that if the Petitioner was presently incompetent, it was because he was not receiving the correct medication. The Court then asked the psychiatrist if that meant that the State could medicate in order to eradicate. The expert answered "yes." The report of Dr. Jonathan Pincus, dated April 1, 1997, states that the Petitioner has not been receiving medication. See Exhibit C to Motion for Expert Services. This fact alone raises serious concerns in the mind of this Court as to whether the Petitioner is presently capable of understanding 1) that he is to be punished by execution, and 2) why he is being punished. Without more guidance from the Ninth Circuit or the United States Supreme Court, this Court concludes that it lacks jurisdiction to review the state court proceedings below to ensure that the Petitioner is receiving his medication and, therefore, is competent to be executed.

Martinez-Villareal v. Stewart, No. CIV-86-296-TUC-RMB (D. Ariz. May 16, 1997) slip at 3-4. Although Judge Bilby clearly wanted to hear this claim, he believed he had no jurisdiction to do so.

The same day that the District Court entered its order, the Arizona Supreme Court denied Mr. Martinez-Villareal's petition

for Special Action to review the superior court's competency ruling. Two members of that Court expressed serious reservations about allowing his execution to go forward:

> The definition of incompetence [for execution] is quite narrow. However, the evidence makes it clear that Defendant is mildly retarded and seriously mentally ill. He may well have been in that condition at the time of the crime. At the mitigation hearing, his lawyer did not present evidence of his mental condition or problems. . . . In short, this is a case that raises serious doubts about the propriety of the death sentence.

Martinez-Villareal v. Pinal County Superior Court, No. CV-97-0206-SA (AZ, May 16, 1997) (Zlacket, C.J., and Feldman, J., concurring).[5]

In providing Mr. Martinez-Villareal an opportunity to seek federal court enforcement of his Eighth Amendment rights, the court fashioned a remedy to fit the unprecedented procedural

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[5]Even as the Arizona Supreme Court and the District Court were handing down their orders, the Justice of the Peace and the trial judge were testifying before the Arizona Board of Clemency. Judge Robert Montiel, who sentenced Mr. Martinez-Villareal to death without the benefit of any evidence regarding his mental retardation, brain damage and mental illness, testified that he believes Mr. Martinez-Villareal's execution would be unfair. Justice of the Peace Eduardo Saavedra, who initially arraigned Mr. Martinez-Villareal, also expressed concern, based on his observations, that Mr. Martinez-Villareal was unable to understand the proceedings.

posture of this competency claim:

> Under our holding, a competency claim must be raised in a first habeas petition, whereupon it must be dismissed as premature due to the automatic stay that issues when a first petition is filed. Once the state issues a second warrant of execution and the state court considers the now-ripe competency claim, a federal court may hear that claim--and only that claim--because it was originally dismissed as premature and therefore falls outside of the rubric of "second or successive" petitions.

Martinez-Villareal v. Stewart, 108 F.3d 628, 634 (9th Cir. 1997). The court described its ruling as "a narrow one that is inherently limited by the unique nature of [Mr. Martinez-Villareal's] competency claim." Id. This ruling is the subject of Petitioners' scatter-gun request for this Court's intervention.

II. REASONS FOR DENYING THE WRITS

A. The Court Lacks Jurisdiction Over The Case.

28 U.S.C. § 2244(b)(3)(E) prohibits judicial review of the Court of Appeals' action on Mr. Martinez-Villareal's authorization motion. Review by the various extraordinary writs Petitioners seek to invoke is also unavailable because they can not make the necessary showing. See Jurisdiction, supra. On this basis alone, this Court should deny the Combined Alternative

Petition.

B. The Court of Appeals Did Not Find That The 1996 Amendments To 28 U.S.C. § 2244 Constitute A Suspension Of The Writ.

The first two questions presented by Petitioners ask this Court to interpret the Suspension Clause of the Constitution. However, the court below clearly rested its decision, as a matter of statutory interpretation, on its finding that, under the rare circumstances of this case, Ramon Martinez-Villareal's habeas petition does not present "successive" claims within the meaning of the AEDPA. Martinez-Villareal v. Stewart, 118 F.3d at 634. Thus, questions concerning the Suspension Clause are not presented here.

C. The Court Of Appeals' Decision That This Was Not A "Second or Successive" Petition Because The Claim It Raised Was Not Previously Adjudicated On Its Merits Is Consistent With The Decision Of Every Other Circuit That Has Addressed The Question.

The Court of Appeals decided this case under extremely narrow grounds:

> Under our holding, a competency claim must be raised in a first habeas petition, whereupon it must be dismissed as premature due to the automatic stay that issues when a first petition is filed. Once the state issues a second warrant of execution and the state court considers the now-ripe competency claim, a federal court may hear that claim--and only that claim--because it was

> originally dismissed as premature and therefore falls outside of the rubric of "second or successive" petitions.

Martinez-Villareal v. Stewart, 118 F.3d at 634. The court described its ruling as "a narrow one that is inherently limited by the unique nature of [Mr. Martinez-Villareal's] competency claim." Id. The ruling Petitioners complain of is bound up in a factually detailed procedural history surrounding Mr. Martinez-Villareal's persuasive evidence of mental incompetence.

Counsel has been unable to find a case reported anywhere in the United States where a prisoner presented a competency claim in a first petition that was dismissed without prejudice on the state's motion that would fit within this narrow holding. The court below observed, "Indeed, we can think of no other situation where a first petition meets [Rose v. Lundy's] exhaustion requirement but a claim raised by that petition must be tabled as premature." Because courts had not applied the abuse of the writ doctrine to claims regarding present competency for execution, cases in which a first petition presents a competency to be executed claim will be extremely rare. See Barnard v. Collins, 13 F.3d 871, 878 (5th Cir. 1994)("our research indicates no reported decision in which a federal circuit court or the Supreme Court has denied relief of a petitioner's competency-to-be-executed

claim on grounds of abuse of the writ."). Thus, the ruling below is likely to effect very few, if any, other cases.

The court below was concerned with the obvious inequities that would result from retroactive application of the AEDPA to effectively amend a judgment of the Ninth Circuit Court of Appeals by converting a dismissal without prejudice to a dismissal with prejudice. The Court of Appeals simply gave effect to its prior order, entered at Petitioners' behest, dismissing Mr. Martinez-Villareal's competency to be executed claim without prejudice.

Petitioners allege that the ruling of the court below conflicts with In re Medina, 109 F.3d 1556 (11th Cir. 1997). This allegation ignores the substantially different procedural posture of each case and the extremely narrow ruling of the court below, tailored to the unique facts of this case. Unlike Medina, Mr. Martinez-Villareal sought review of his competency-to-be-executed claim on his first federal habeas petition, after the state summarily refused to even consider the issue under a properly-invoked state procedure. Unlike Medina, Mr. Martinez-Villareal's claim was dismissed without prejudice from his first petition on the state's motion, alleging that the claim was not "ripe" for review. These distinguishing factors define the

parameters of the narrow rule fashioned by the court below, and in no way conflict with the rule set out in Medina. The Fifth Circuit agreed, holding that a prisoner could not file a second habeas petition raising a competency-to-be-executed claim because, unlike Mr. Martinez-Villareal, he had not attempted to litigate his claim on his first habeas petition. In re Davis, 1997 W.L. 534153 (5th Cir. Aug. 27, 1997). The Fifth Circuit found that this fact distinguished Martinez-Villareal from Medina and its own case.

Other appellate courts have reached the same conclusion as the court below under analogous circumstances. Reeves v. Little, No. 87-741, 1997 WL 459783, *3 (10th Cir. Aug. 13, 1997)(where prior petition alleging state court delay in processing criminal direct appeal was dismissed without prejudice after federal court determined that petitioner was not prejudiced by delay, next petition raising claims following exhaustion of state court remedies was not a second or successive petition within amended § 2244(b)'s prohibition); In re Gasery, 116 F.3d 1051, 1052 (5th Cir. 1997)(where prior petition was dismissed without prejudice to exhaust state court remedies, next petition was not second or successive within meaning of amended § 2244); Christy v. Horn, 115 F.3d 201, 208 (3rd Cir. 1997)(petition filed after earlier

petition dismissed without prejudice to exhaust state court remedies is not a second or successive petition under amendments to §2244); In re Turner, 101 F.2d 1323 (9th cir. 1997)(same); Dickinson v. Maine, 101 F.3d 791 (1st Cir. 1996)(same); Benton v. Washington, 106 F.2d 162, 164-65((7th Cir. 1996) (where first petition dismissed for failure to pay filing fee, next petition was not second or successive under amended § 2244); Camarano v. Irvin, 98 F.3d 44, 46-47 (2nd Cir. 1996)(petition filed after earlier petition dismissed without prejudice for failure to exhaust state remedies is not a second or successive petition under amended § 2244). See also In re Vial, 115 F.3d 1192, 1195 n.6 (4th Cir. 1997)("The parties do not dispute that the meaning of `second or successive' is the same under the AEDPA as under prior law.")(citations omitted). All of these courts concluded, as did the Court of Appeals here, that the terms "second or successive" retain the same meaning under the AEDPA amendments, as they did before the amendments, Reeves v. Little, supra, at *2; In re Gasery, 116 F.3d at 1052; Benton v. Washington, 106 F.3d at 164; Camarano v. Irvin, 98 F.3d at 46; Martinez-Villareal v. Stewart, 118 F.3d 632-33, and that prior claims dismissed without prejudice in an earlier petition are not "second or

successive" claims under § 2244(b).[6]

As these appellate courts all found, the historical meaning of "second or successive" petition was not changed by the AEDPA amendments. In re Gasery, 116 F.3d at 1052; Martinez-Villareal v. Stewart, 118 F.3d at 632-633; Christy v. Horn, 115 F.3d at 208; Camarano v. Irvin, 98 F.3d at 46-47. A claim raised in a prior petition that is dismissed without prejudice has "no preclusive effect on subsequent petitions." Camarano v. Irvin, 98 F.3d at 47. See Schlup v. Delo, 115 S.Ct. 851, 863 n.34 (1995)("`successive petition' raises grounds identical to those raised and rejected on the merits on a prior petition"); Sawyer v. Whitley, 505 U.S. 333, 348 (1992)(claim is "successive"

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[6]Other circuits have avoided inequitable results in circumstances similar to this case by declining to apply the AEDPA to situations where it would upset settled expectations, in violation of retroactivity principles. This Court was aware that "there may well be difficult issues, and it may be that application of Landgraf's default rule will be necessary to settle some of them." Lindh v. Murphy, 117 S. Ct. 2059, 2064 (1997). Landgraf v. USI Film Products, 114 S. Ct. 1483 (1994), prohibits, absent clear Congressional intent, the application of a new statute which "attaches new legal consequences to events completed before its enactment." Thus, in Burris v. Parke, 95 F.3d 465 (7th Cir. 1996), the court held that the AEDPA did not apply retroactively to bar a second habeas petition where the state had "mousetrapped" a petitioner into believing that he would be able to raise certain claims in a subsequent habeas petition. The same observation could be made of the state's conduct in this case.

because "it was rejected on the merits in ... first petition").

The claim at issue here was not rejected on the merits. At Petitioners' request, it was dismissed without prejudice to be litigated after Mr. Martinez-Villareal's other claims had been resolved and his execution was imminent. It is not a successive claim under old or new law.[7]

Moreover, no legislative history supports Petitioners' contention that the Court of Appeals "rewrote" the statute to reach its result. There is no evidence that Congress intended to preclude litigation of claims that were raised in a prior petition but could not be adjudicated either as a result of the

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[7]Indeed, Petitioners failure to challenge the final judgment dismissing the competency claim "without prejudice" settles the issue under the law of the case doctrine. "Under the law of the case doctrine, a decision on an issue of law made at one phase of the litigation becomes a binding precedent to be followed in successive stages of the same case." Ulmet v. United States, 17 Cl. Ct. 679, 689 (U.S.Cl. Ct. 1989), aff'd, 935 F.2d 280 (Fed. Cir. 1991). The law of the case doctrine "binds every court to honor the rulings in the case by superior courts." Casey v. Planned Parenthood of Pennsylvania, 14 F.3d 848, 855 (3rd Cir. 1993). Mr. Martinez-Villareal's right to plenary federal review of his competency-to-be-executed claim was explicitly reserved in the mandate of the Ninth Circuit Court of Appeals. Petitioners did not avail themselves of any of the procedures for seeking timely and orderly review of that aspect of the ruling of the court below. Instead, they waited for the issuance of a warrant for Mr. Martinez-Villareal's execution, and at the eleventh hour raised this defense, based on the new provisions of the AEDPA, for the very first time.

nature of the claim (it was not exhausted or was premature), or as a result of a state's insistence that the claim should not be litigated until a later petition is filed. See Camarano v. Irvin, 98 F.3d at 46. This claim was not dismissed as a result of any dilatory or negligent action on Mr. Martinez-Villareal's behalf. It was dismissed on Petitioners' motion because it was determined to be premature.

B. The Equities Do Not Favor Petitioners

Petitioners come to this Court with unclean hands. Throughout this litigation, Petitioners have taken shifting and inconsistent positions in different courts, in order to get a procedural advantage over this mentally retarded, mentally ill, illiterate, indigent capital defendant. They ultimately defeated his claim of ineffective assistance of counsel, after shifting their positions with regard to state procedural default issues several times. They told the District Court and the Court of Appeals that the competency issue was not ripe and could be adjudicated later, and then stood mute and never notified the courts below of their intention to change their position in light of the newly amended law, until the District Court had issued a final order dismissing the first petition in reliance on their previous position. They argued to the Court of Appeals below

that the writ had not been suspended because this Court retained the ability to examine Mr. Martinez-Villareal's competency under 28 U.S.C. § 2241, but now have told this Court the opposite as they bring the case here.

In contrast, Mr. Martinez-Villareal has done nothing to disentitle him to the relief provided below. This is not a case where a habeas petitioner seeks to litigate on a second habeas petition an issue omitted from a first one. In fact this case presents the antithesis of the kind of delay with which Petitioners accuse the lower courts. Mr. Martinez-Villareal's counsel have done everything possible to bring the problem of Mr. Martinez-Villareal's incompetence to every court with jurisdiction to hear it, at the earliest possible date.

There is no basis for equitable intervention here. The Court of Appeals has done nothing more than provide Petitioners what they asked for under the unique circumstances of this case, and in accordance with the AEDPA amendments. See also Burris v. Parke, 955 F.3d at 468(where petitioner "moustrapped" into believing that the issue he raised in his second federal petition could be heard by the federal court, state estopped from pleading prohibition against fiing of second petition). The Court of Appeals decision was neither incorrect nor extraordinary. The

result of its action was not unjust. The equities of this case, based on the conduct of the parties below, favor Mr. Martinez-Villareal, and not the circumvention of Congress' limitation of this Court's jurisdiction that the Petitioners seek.

III. CONCLUSION.

The Combined Alternative Petition should be dismissed or denied.

Dated this 17th day of September, 1997.

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EXHIBIT A

FILED

JUN 30 1997

JUN 25 1997

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAMON MARTINEZ-VILLAREAL, Petitioner, v. TERRY STEWART, Respondent.	Nos. 94-99011, 94-99012, 97-80229, 97-99009 D.C. No. CV-86-00296-RMB ORDER

Before: D.W. NELSON, LEAVY, and T.G. NELSON, Circuit Judges.

Petitioner's "'Second' Petition for Rehearing with Suggestion for Rehearing En Banc," filed on June 6, 1997, is DENIED as moot, in view of our Order filed on June 23, 1997, in docket numbers 97-80229 and 97-80249.

BEST AVAILABLE COPY

CERTIFICATE OF SERVICE

I hereby certify that on this 17th date of September, 1997, a copy of the Brief in Opposition To Combined Alternative Petition for Statutory Writ of Certiorari or For Extraordinary Writ (Mandamus, Prohibition, or Common Law Writ of Certiorari) was served on all parties required to be served by depositing a copy in a United States mailbox, first class postage prepaid, and addressed to counsel for Petitioners:

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